

United States
Circuit Court of Appeals
For the Ninth Circuit.

UNITED STATES FIDELITY & GUARANTY COM-
PANY, a Corporation,

Appellant,

vs.

GEORGE B. BURKE and E. W. FERRIS, as Admin-
istrator of the Estate of DAVID L. KELLY, De-
ceased, and MOUNTAIN TIMBER COMPANY,
a Corporation,

Appellees.

Transcript of Record.

Upon Appeal from the United States District Court
for the Western District of Washington,
Southern Division.

Filed

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F. D. Monckton,

Clerk.

No. 2744

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

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Solicitors for the Appellees. [1*]

*Page-number appearing at foot of page of original certified Record.

*In the United States District Court for the Western
District of Washington, Southern Division.*

UNITED STATES FIDELITY & GUARANTY
COMPANY, a Corporation,

Appellant,

v.

GEORGE V. BURKE, and E. W. FERRIS, as Ad-
ministrator of the Estate of DAVID L.
KELLY, Deceased, and MOUNTAIN TIM-
BER COMPANY,

Appellees.

**Stipulation for Statement on Appeal of the U. S.
Fidelity & Guaranty Company, a Corporation.**

It is hereby stipulated and agreed by and be-
tween the appellant, U. S. Fidelity & Guaranty Com-
pany, and the respondents, by their respective at-
torneys, that the following statement of the case
shows as fully as is necessary to an understanding
of the question on this particular appeal, the facts
alleged and proved or sought to be proved, and how
the question at issue arose and was decided by the
United States District Court for the Western Dis-
trict of Washington, Southern Division, and said
parties agree that such statement may be filed in
the office of the clerk of said district court and may,
together with the final decree herein, be certified
to the U. S. Circuit Court of Appeals for the Ninth
Circuit as the record on this appeal, in accordance
with Rule 77 of the Rules of Practice for the Courts
of Equity in the United States. [2]

Statement of the Case.

The original complaint herein was filed by Geo. V. Burke versus Mountain Timber Company, a Corporation, in the United States District Court for the Western District of Washington, Southern Division. After setting forth the diverse citizenship of the parties the complaint alleges that the defendant at Portland, Oregon, on Feb. 3, 1910, made, executed and delivered to one David L. Kelly, its certain promissory notes for the principal sum of thirty-two thousand, five hundred (\$32,500.00) dollars, with interest at 5% per annum, and simultaneously therewith to secure payment thereof made, executed and delivered to the said David L. Kelly, a mortgage on certain real estate in the county of Cowlitz, State of Washington, which said mortgage was duly recorded; that David L. Kelly is now deceased, and Frank G. Kelly was duly appointed administrator of his estate, and that said administrator had assigned said notes and mortgage to the plaintiff; that the principal and interest of said notes remain unpaid and that \$5,000.00 is a reasonable sum to be allowed as attorney's fees, in accordance with the provisions of the notes and mortgage.

The following paragraphs of said complaint are significant in connection with this particular appeal:

[Portions of Complaint.]**“XIII.**

Plaintiff alleges that the chief and principal value of the mortgaged premises described in said mort-

gage and in this complaint described, consists in the merchantable timber standing thereon. That said mortgage herein referred to and hereto attached, contains a stipulation as follows, namely: [3]

‘Provided, and said mortgagor company hereby covenants and agrees to and with said D. L. Kelly, and his assigns, that any timber cut by said Mountain Timber Company, or its assigns, on any of the above-described lands before full satisfaction and payment of this mortgage shall be paid for to said D. L. Kelly, or his assigns, at or before the time of cutting the same, at the rate of \$2.50 per thousand feet, according to the log scale or cruise made by a cruiser or scaler selected and agreed upon by the parties hereto, and the payments so made shall apply upon the amount due upon this mortgage.’

XIV.

Plaintiff alleges that defendant has heretofore cut a large amount of timber from said mortgaged premises without complying with the terms and condition of said stipulation of said mortgage set forth in the preceding paragraph hereof, and without making any payment or payments or account thereof, and is at the present time engaged in cutting a large amount of timber thereon and threatens to and will, unless restrained by an order of this Honorable Court, continue to cut and remove from said premises large quantities of timber now standing thereon, thereby endangering, lessening and depreciating the mortgage security afforded by the conditions and provisions of said mortgage, and unless re-

strained and enjoined by order of this Court, defendant will cut and remove so much of said timber as to greatly impair, if not wholly destroy the mortgage security aforesaid, and plaintiff will thereby become deprived of the benefit and value of the security so granted and afforded by the terms and conditions of said mortgage.”

The prayer of said complaint in addition to judgment, foreclosure, sale, etc., asks the following additional relief:

“That a temporary injunction issue, restraining and enjoining the defendant, its agents, attorneys, servants, and all persons acting by, under, or through it, from cutting or removing any timber now standing, growing or being upon said mortgage premises, and that upon the final hearing of this cause said temporary injunction be made permanent.” [4]

An answer was filed by the Mountain Timber Company denying, among other things, the allegations of paragraphs XIII and XIV of the complaint. There is also the further and separate answer which does not, however, affect the question involved in this particular appeal.

On April 25, 1913, the plaintiff filed the following

MOTION.

[Notice of Motion for Temporary Injunction.]

To Mountain Timber Company, a Corporation, Defendant Above Named:

Please TAKE NOTICE that on Monday, the 5th day of May, 1913, at 10:00 o'clock in the forenoon of said day, or as soon thereafter as counsel can be

heard, the plaintiff in this action will move the Court for a temporary injunction to be issued herein, enjoining and restraining the defendant, its officers, agents, servants, and all persons acting by, under, or through it, from cutting and removing any timber now standing, growing, or being upon the premises described in the complaint herein, against which a mortgage foreclosure is sought in accordance with the prayer of said complaint.

The application for temporary injunction will be made on the verified complaint in this action and the affidavit of Frank G. Kelly, the originals of which have heretofore been filed, and copies thereof herewith served upon you.

Sgd.—M. J. GORDON and
J. H. EASTERDAY,
Solicitors for Plaintiff.” [5]

Accompanying said motion was the following
**Affidavit [of F. G. Kelly on Motion for Temporary
Injunction].**

“State of Oregon,
County of Multnomah,—ss.

I, F. G. Kelly, being first duly sworn, depose and say that I am the duly appointed, qualified and acting administrator of the Estate of D. L. Kelly, deceased, in the State of Oregon, having been appointed by due and regular order of the County Court of the State of Oregon for Multnomah County, said D. L. Kelly being the payee in those certain notes described in the complaint in the above-entitled action.

That said defendant, Mountain Timber Company, is extensively engaged in the sawmill, lumber and logging business in Cowlitz County, Washington, operating and running a large sawmill in said county.

That said defendant has been and now is actually cutting and removing off of the land described in plaintiff's complaint the standing and growing timber thereon of merchantable character, and *are* failing, refusing and neglecting to account for the timber in accordance with the terms of said mortgage therein described in said complaint.

That practically half or more of the timber which stood thereon at the time of the execution of said mortgage has been cut and removed from said land by said defendant, its agents and employees, and said defendant threatens and states to your deponent that it will continue to cut and remove said timber until the same and the whole thereof has been cut and removed and will denude said land of all of its timber.

That said timber when cut and removed therefrom by said defendant is immediately sawed up in the sawmill of said defendant and sold and disposed of, and as to that already cut and removed, said plaintiff has no means of ascertaining the amount thereof.

That if said defendant is permitted further to cut and remove said timber standing and growing on said land, plaintiff's security will be inadequate to satisfy the amount of said notes secured by said mortgage, and said mortgage security will be rendered valueless.

That the chief value of said mortgage security lies in the timber standing and growing on said land, the said land if denuded of its timber has practically no value.

That said land has already been so depleted of its timber by said defendant that it is now very doubtful whether or not the remaining portion thereof is sufficient to satisfy said mortgage, and every day said defendant is allowed to cut and remove said timber is an immediate and irreparable loss and damage to said plaintiff.

That said defendant is heavily involved in debt, and [6] divers and numerous suits and actions are pending against *them* in which said suits and actions, if said defendant is unsuccessful, large judgments will be secured against said defendant and will be prior liens to any deficiency judgment which might be obtained by said plaintiff in this action.

That said defendant by and through its officers and agents have promised to pay off and liquidate said notes and mortgage, and have used said promises as a cloak to continue to cut and remove said timber and denude said land of its timber, and if permitted to continue further to cut and remove said timber, plaintiff's mortgage security will be rendered valueless and great, immediate and irreparable loss and damage will result to said plaintiff and plaintiff's assignor.

Sgd.—F. G. KELLY.

Subscribed and sworn to before me this 19th day of April, 1913.

(Notarial Seal)

Sgd.—J. F. SHELTON,

Notary Public for Oregon.”

On May 5, 1913, there was filed the following

Stipulation [Withdrawing Application for Injunction, etc.]

“WHEREAS, the plaintiff in the above-entitled action has heretofore filed his bill of complaint seeking foreclosure of mortgage in said bill mentioned, and has also made application for a preliminary injunction restraining defendant from cutting timber on the alleged mortgaged premises during the pendency of this action; and

WHEREAS, the defendant has on this 5th day of May, 1913, filed in this court and cause a bond in the sum of \$45,000.00 with the United States Fidelity & Guaranty Company as surety thereon, conditioned for the payment in full of any judgment which shall be rendered in favor of the plaintiff in this action;

NOW THEREFORE, in consideration of the filing of said bond, it is hereby STIPULATED AND AGREED,

First: That plaintiff's application for an injunction be and the same is hereby withdrawn; and

Second: It is further STIPULATED that defendant may have to and including June 5, 1913, in which to enter further appearance in said action.

10 *United States Fidelity and Guaranty Co.*

Dated this 5th day of May, 1913.

Sgd.—GORDON & EASTERDAY,
Solicitors for Plaintiff.

Sgd.—E. C. STRODE,
A. H. IMUS,
ABEL & BURNETT,
Solicitors for Defendant.” [7]..

Accompanying said stipulation was the following

Bond [for Payment of Judgment].

*“In the District Court of the United States for the
Western District of Washington, Southern Di-
vision.*

GEORGE B. BURKE,

Plaintiff,

v.

MOUNTAIN TIMBER COMPANY, a Corporation,
Defendant.

WHEREAS, in the above-entitled court and cause plaintiff above named, on the 25th day of April, 1913, filed his complaint asking judgment against the defendant for the sum of thirty-two thousand, five hundred (\$32,500.00) dollars, together with interest thereon at 5% from the 3d day of February, 1910, with attorney's fees, and in said complaint prayed for a temporary and permanent injunction enjoining the defendant from further cutting the timber upon lands described in said complaint;

NOW, THEREFORE, we, Mountain Timber Company, a corporation, as principal, and United States Fidelity & Guraanty Company of Baltimore, Mary-

land, as surety, are held and firmly bound unto George B. Burke in the penal sum of forty-five thousand dollars (\$45,000.00) for the payment of which, well and truly to be made, we hereby bind ourselves, our successors or assigns, provided, and the condition of this obligation is such that if Mountain Timber Company shall pay, or cause to be paid, in full any judgment which shall be rendered in favor of the plaintiff in the above-entitled action, then this undertaking to be null and void, otherwise to be and remain in full force and effect.

Dated this 3d day of May, 1913.

Sgd.—MOUNTAIN TIMBER COMPANY,
By COY BURNETT, Principal.

Sgd.—U. S. FIDELITY & GUARANTY
COMPANY,

By JOHN C. STANTON,
By Attorney in Fact,
Surety.

[S. Corporate Seal.] [8]

The plaintiff consenting to the form and sufficiency thereof this bond is hereby allowed and approved.

Dated May 5, 1913.

Sgd.—EDWARD E. CUSHMAN,
Judge.”

A COMPLAINT IN INTERVENTION was filed by E. W. Ferris, as Administrator of the Estate of David L. Kelly, reciting the appointment of E. W. Ferris as such administrator, his qualifications and other formal allegations. Among them the refusal of the plaintiff to surrender to the intervenor said notes and mortgage.

Thereafter, on the 21st of September, 1913, an order was entered directing that said Ferris be made a party plaintiff in his said capacity of administrator and that said suit be continued in the names of said Burke & Ferris as parties plaintiff, and extending to the plaintiffs leave to file a supplemental complaint against the defendant, Mountain Timber Company. The SUPPLEMENTAL COMPLAINT was thereupon filed on behalf of Geo. V. Burke and E. W. Ferris, as Administrator, etc., as plaintiffs, versus Mountain Timber Company, a corporation, defendant. The Supplemental Complaint, in so far as material to this appeal, contains the following allegations:

[Portions of Supplemental Complaint.]

“IV.

Thereafter, and upon application for a temporary injunction as prayed for by the plaintiff Burke, in his said complaint, the defendant executed to the said Burke, with the U. S. Fidelity & Guaranty Company, as surety, a bond in the sum of \$45,000.00 conditioned in substance, that the Mountain Timber Company would pay or cause to be paid, any judgment which might be rendered in said cause; in consideration of the execution and filing of the said bond, a temporary writ of injunction was not issued, and the defendant was not restrained from continuing to cut and remove the timber from said lands, said timber constituting a substantial part, or the sole value of the security for the mortgage aforesaid.

XVII.

And these plaintiffs reaffirm and reallege by a reference, the allegations contained in paragraph thirteen of the complaint filed by the plaintiff Burke, herein, and in this connection allege, that since the bringing of this suit, and the execution of the bond hereinbefore referred to, and which has been filed with the clerk of this court, and is a part of the files and records herein (reference being made to said bond for a more particular statement of its terms), the defendant has cut and removed from the premises described in said mortgage, substantially all of the standing and growing timber thereon, which constituted a substantial part of the value of the security of said mortgage, and that by reason thereof the value of the security upon the land described in said mortgage, denuded of its standing and growing timber as aforesaid is, as plaintiffs are informed and believe, and therefore allege the fact to be, very much less than the amount due upon the mortgage; and that the bond executed and filed in this cause as aforesaid, is the substantial security upon which the plaintiffs must rely in this case for the enforcement of any judgment that may be obtained herein."

In the prayer of said supplemental complaint, in addition to the relief asked for in the original complaint it was also prayed

"That plaintiffs have judgment against the defendant and against the surety upon the bond mentioned in the complaint herein, and in this supplemental complaint, for the principal sum of \$32,500.00,

together with interest thereon from the 3d day of February, 1910, at the rate of 5% per annum, and for such further sum as the Court shall adjudge reasonable for attorney's fees, for the bringing and prosecution of this suit, and for their costs and disbursements herein."

The Mountain Timber Company answered, denying among other matters, the allegations of paragraphs IV and XVII of the supplemental complaint.

A further and separate answer was also filed by the said company but same is not material on this appeal. [10]

A reply was filed by the plaintiffs to the further and separate answer of the Mountain Timber Company, but same is not essential here.

On June 15, 1915, the Hon. Edward E. Cushman, Judge of said court rendered an opinion in favor of the plaintiffs and against the defendant, Mountain Timber Company. In the course of said opinion the Court said with regard to matters material on this subject:

[Portion of Opinion.]

"This is a suit to foreclose a purchase money mortgage brought by the administrator of the mortgagee, David L. Kelly, The present suit was brought after these tenders were made. The mortgage provided that any timber cut by defendant upon the mortgaged lands before full satisfaction of the mortgage should be paid for at the rate of \$2.50 per thousand feet, at, or before the time of cutting the same. There was no attempt to comply with

this provision before, or after the making of these tenders, although a large amount of timber was cut and removed from the land. At the commencement of the suit, the complainant, Burke, asked an injunction against the further cutting of timber in such manner. To avoid the issuance of such injunction, the defendant, with the United States Fidelity & Guaranty Co., as surety, executed a bond to the complainant, Burke, in the amount of \$45,000 conditioned to pay any judgment executed herein. . . .’}

On July 6, 1915, the following notice with endorsements set forth, was filed in said Court:

[Notice of Motion for Filing and Entering of Findings of Fact and Conclusions of Law, etc.]

“In the District Court of the United States for the Western District of Washington, Southern Division.

GEORGE B. BURKE and E. W. FERRIS, as Administrator of the Estate of DAVID L. KELLY, Deceased,

Plaintiff,

v.

MOUNTAIN TIMBER COMPANY, a Corporation,
Defendant. [11]

To the Above-named Defendant, Mountain Timber Company, and Coy Burnett, its Attorney, and United States Fidelity & Guaranty Company:

Please take notice, that on Tuesday, July 6, 1915, at ten o’clock in the forenoon of that day, or as soon thereafter as counsel can be heard, and at the court-

room of said court, in the Federal Building, in Tacoma, Washington, the plaintiffs will move for the signing and entering of Findings of Fact and Conclusions of Law, by said Court, in accordance with the opinion of the Court heretofore rendered and filed, and in accordance with the Findings and Decree, copies of which have heretofore been served upon the defendant in this case.

And at the same time and place, the plaintiffs will move for the entry of Findings and Decree, which, among other things, will provided, that judgment and decree shall go against the defendant, and United States Fidelity & Guaranty Company, surety upon the bond to stay the issuance of an injunction; execution to issue against said companies, and either thereof, and their property jointly, in the event of a deficiency.

Dated this 2d day of July, 1915.

Sgd.—M. J. GORDON and
A. E. CLARK and
M. H. CLARK,
Attorneys for Plaintiffs.

The following acknowledgment of service was on the cover of the above notice:

State of Oregon,
County of Multnomah,—ss.

Due service of the within notice, is hereby accepted in Multnomah County, Oregon, this 2d day of July, 1915, by receiving a copy thereof, duly certified to

as such by M. H. Clark, of Attorneys for Plaintiffs.

Sgd.—COY BURNETT,

W. K. K.,

Of Attorneys for Defendant, Mountain Timber Company.

The following affidavit was also on the cover of said notice:

State of Oregon,

County of Multnomah,—ss.

I, J. F. Alexander, being first duly sworn, upon oath, depose and say that I am over the age of 21 years, a citizen, resident and inhabitant of the city of Portland, Multnomah County, Oregon; that I am employed in the office of A. E. Clark and M. H. Clark, attorneys at law, in said city; that I served the within notice on the United States Fidelity & Guaranty [12] Company, by handing to, and leaving with, Charles E. Newman, a clerk in the office of Douglas R. Tate, statutory agent of said United States Fidelity & Guaranty Company, a duly certified copy of said notice certified to by M. H. Clark, one of the attorneys for the plaintiff; that said service was made this 2d day of July, 1915, at the office of said company and statutory agent in the Chamber of Commerce Building, Portland, Oregon.

Sgd.—J. F. ALEXANDER,

Subscribed and sworn to before me this 2d day of July, A. D. 1915.

(Notarial Seal)

Sgd.—M. H. CLARK,

Notary Public for Oregon, Residing at Portland, therein.

My commission expires Feb. 21, 1916.

[Portions of Findings of Fact.]

On July 6, 1915, findings of fact and conclusions of law were entered in said court, which, in so far as material to this appeal, recite:

FINDINGS OF FACT—Paragraph XIII.

“That the lands described in said mortgage, at the time of the execution of said mortgage, were covered by standing, merchantable timber; that said timber constituted the principal value of said land, and the principal part of the value of the security created by said mortgage; that, among other things and by the terms of said mortgage; the defendant did covenant,

‘and said Mortgagor Company hereby covenants and agrees to and with the said D. L. Kelly, and his assigns, that any timber cut by said Mountain Timber Company, or its assigns, on any of the above-described lands before full satisfaction and payment of this mortgage shall be paid for to said D. L. Kelly, or his assigns, at or before the time of cutting the same, at the rate of \$2.50 per thousand feet, according to the log cruise or cruise made by a cruiser or scaler selected and agreed upon by the parties hereto, and the payments so made [13] shall apply upon the amount due upon this mortgage.’

That since the execution of said mortgage, the defendant Mountain Timber Company has cut and removed from said land, practically all of the standing and merchantable timber thereon, constituting the

chief value of the security; that the defendant has ignored, and failed to keep and perform the last quoted covenant contained in said mortgage, and has not paid any sum or sums whatsoever upon the mortgage debt, according to said covenant or otherwise."

Paragraph XIV.

"That in the complaint by which this action was commenced, the plaintiff, among other things, did pray that a temporary injunction issue, restraining and enjoining the defendant, its agents, attorneys, servants, and all other persons acting by, under or through it, from cutting or removing any timber standing, growing, and being upon said mortgaged premises; that upon final hearing of this cause, said temporary injunction be made permanent. Immediately following the commencement of this action, and based upon the files and records of said cause, and supported by affidavit, the plaintiff did move for a writ of temporary injunction in accordance with said prayer. A hearing was had thereon, and in connection with said hearing, and in consideration that the plaintiff would withdraw his application for a writ of temporary injunction, the defendant, as principal, and the United States Fidelity & Guaranty Company, of Baltimore, Maryland, as surety, did duly execute and file with the clerk of this court, a bond in words and figures as follows, to wit:"

(The bond having been heretofore set out is not now recopied.)

Paragraph XV.

"That at the time of the commencement of this

action, and at the time of the application for a temporary injunction as aforesaid, and likewise at the time of the execution of said bond, the defendant was engaged in cutting and removing the standing, merchantable timber from said mortgaged premises, and there was still a large amount of standing, growing and merchantable timber thereon; that in consideration of the execution of said bond, the plaintiff did not seek to obtain a temporary writ of injunction and defendant was permitted to cut and remove the timber from said premises; and that since the execution of said bond the defendant has cut and removed a large quantity of the timber from said mortgaged premises, and has thus diminished and impaired the security of said mortgage debt in a substantial amount.” [14]

And as

Conclusions of Law

therefrom the Court found that the plaintiffs were entitled to:

(a) Judgment against the defendant, Mountain Timber Company, and the United States Fidelity & Guaranty Company, of Baltimore, Maryland, for the sum of \$32,500.00, with interest thereon at the rate of 5% per annum from the 3d day of February, 1910; and the further sum of \$2,500.00 attorney's fees, and the costs and disbursements of this action.

(b) Judgment for the foreclosure of the mortgage mentioned and described in the complaint and in the supplemental complaint in this cause, and directing a sale of said real property, conformably to

the requirements of the statutes, and the rules of this court, and for the other relief prayed for in said complaint, and in said supplemental complaint.

Thereafter and upon the same day after allowing to the Mountain Timber Company exceptions to each of said findings, the Court entered a decree against the Mountain Timber Company and against the appellant herein, the United States Fidelity & Guaranty Company, as set forth in detail in the annexed certified copy of said decree.

And afterwards, to wit, on the —— day of January, 1916, there was duly filed in said court and cause by the U. S. Fidelity & Guaranty Company, appellant, a petition for appeal in words and figures as follows, to wit:

Petition for Appeal.

The U. S. Fidelity & Guaranty Company, a Maryland corporation, feeling aggrieved by the decree rendered and entered in the above-entitled court and cause on the 6th day of July, 1915, [15] in so far as said decree in terms applies to the said U. S. Fidelity & Guaranty Company, does hereby appeal from said portion of said decree to the U. S. Circuit Court of Appeals for the Ninth Circuit, for the reasons set forth in the assignment of errors filed herewith, and it prays that its appeal be allowed, and that citation be issued as provided by law, and that a transcript of the record proceedings and documents upon which said decree was based, duly authenticated, be sent to the United States Circuit Court of Appeals, for the Ninth Circuit, under the rules of

said court in such cause made and provided.

U. S. FIDELITY & GUARANTY CO.,

By ROSCOE C. NELSON,

Attorney.

BEACH, SIMON & NELSON,

Solicitors for U. S. Fidelity & Guaranty Co.

Order Allowing Appeal.

And now, to wit, on January 3, 1916, it is ORDERED that the appeal be allowed as prayed for.

Sgd.—WM. B. GILBERT,

Judge of the U. S. Circuit Court of Appeals for the Ninth Circuit.

And afterwards, to wit, on the 3d day of January, 1916, there was duly filed in said court and cause assignment of errors in words and figures as follows, to wit: [16]

Assignment of Errors.

Now comes the U. S. Fidelity & Guaranty Company, a Maryland Corporation, and files the following assignment of errors upon which it will rely in the prosecution of its appeal from the decree rendered in the above-entitled court and cause on the 6th day of July, 1915;

First: . That the U. S. District Court for the Western District of Washington, Southern Division, erred in entering as a part of said decree a judgment order that the plaintiff should have and recover of the Mountain Timber Company and the U. S. Fidelity & Guaranty Company, thirty-two thousand five hundred (\$32,500.00) dollars, with interest at

5% from February 3, 1910, and \$2,500 attorney's fees and \$312.00 costs, in all, forty-four thousand one hundred and twenty-eight (\$44,128.00) dollars, with interest at 5% from that date, and that the plaintiffs have execution against the Mountain Timber Company and the U. S. Fidelity & Guaranty Company for any deficit remaining after the sale of the real estate ordered by the said decree to be sold.

The error alleged refers only to so much of said decree as effects the U. S. Fidelity & Guaranty Company, and the claim of error is based on the contention that the U. S. Fidelity & Guaranty Company was not a party to the suit, and that the said Court had no jurisdiction in said cause to render the [17] said judgment and decree, or any judgment or decree whatsoever against the said U. S. Fidelity & Guaranty Co.

WHEREFORE, said U. S. Fidelity & Guaranty Company prays that said decree be reversed in so far as same grants the relief named or any relief, in favor of the plaintiffs against the said United States Fidelity & Guaranty Company,

U. S. FIDELITY & GUARANTY COMPANY,

By ROSCOE C. NELSON,
Attorney.

BEACH, SIMON & NELSON,

Solicitors for U. S. Fidelity & Guaranty Co.,
Appellant. [18]

And on the same day appellant filed in the clerk's office of said court the following

Undertaking on Appeal.

KNOW ALL MEN BY THESE PRESENTS, That, we, the U. S. Fidelity & Guaranty Company, a Maryland corporation, and NATIONAL SURETY COMPANY, are held and firmly bound unto Geo. B. Burke and E. N. Ferris, as administrator of the estate of David L. Kelly, dec'd., and Mountain Timber Company, and to each of them, in the penal sum of One Thousand (\$1,000.00) Dollars, to the payment of which, well and truly to be made, we bind ourselves, successors and assigns, jointly and severally firmly by these presents.

Sealed with our seals and dated this 3d day of January, 1916.

The condition of the above obligation is such that, WHEREAS, heretofore, to wit, on the 6th day of July, 1915, the said Geo. B. Burke and E. N. Ferris, as administrator of the Estate of David L. Kelly, dec'd., in the above-entitled court and cause were awarded a decree against the U. S. Fidelity & Guaranty Company for the sum of Forty-four Thousand, One Hundred and Twenty-eight (\$44,128.00) Dollars, with interest and \$312.00 costs, from which said decree of said Court, the said U. S. Fidelity & Guaranty Company is appealing to the U. S. Circuit Court of Appeals, for the Ninth Circuit.

Now, if the said UNITED STATES FIDELITY & GUARANTY COMPANY, shall well and truly prosecute said appeal to effect and pay all damages,

costs and disbursements which may be awarded to the premises in this bond, or either, or any of them, against the said appellant on said appeal, then the above obligation shall be null and void; otherwise and in the event the said appellant fails to make good its plea on appeal, to be and remain in full force and virtue.

U. S. FIDELITY & GUARANTY CO.

By DOUGLAS R. TATE,
Its Attorney in Fact.

NATIONAL SURETY COMPANY.

By MARC HUBBARD,
Res. Vice-prest.

Attest: M. S. H. CROWE,
Res. Asst. Sec.

In presence of:

C. E. HICKS.
ROSCOE C. NELSON.

Approved:

WM. B. GILBERT,
Judge of the U. S. Circuit Court of Appeals for the
9th Circuit. [19]

*In the United States District Court for the Western
District of Washington, Southern Division.*

GEO. B. BURKE, and E. N. FERRIS, as Adminis-
trator of the Estate of DAVID L. KELLY,
Dec'd.,

Plaintiffs,

v.

MOUNTAIN TIMBER COMPANY, a Corporation,
Defendant.

Citation [on Appeal (Copy)].

United States of America,—ss.

To Geo. B. Burke, E. N. Ferris, Administrator of the
Estate of David L. Kelly, Deceased, and to
Mountain Timber Company:

You are hereby cited and admonished to be and appear before the United States Circuit Court of Appeals, for the Ninth Circuit, at San Francisco, California, on the 1st day of February, 1916, pursuant to the appeal filed in the clerk's office of the District Court of the United States for the Western District of Washington, Southern Division, in the above-entitled cause *herein*, the U. S. Fidelity & Guaranty Company is appellant and Geo. B. Burke and E. N. Ferris, administrator of the estate of David L. Kelly, and Mountain Timber Company, are respondents, to show cause, if any there be, why the decree in the petition and allowance of appeal mentioned should not be corrected and speedy justice [20] should not be done to the parties on their behalf.

WITNESS the Honorable W. B. GILBERT, Judge of the United States Circuit Court of Appeals, for the Ninth Circuit, this 3d day of January, 1916.

Sgd.—WM. B. GILBERT,
Circuit Judge.

I hereby this 3d day of January, 1916, accept due

personal service of this citation on behalf of Geo. B. Burke.

Sgd.—A. E. CLARK,
Of Attorneys for Geo. B. Burke.

M. J. GORDON,
Of Attorneys for E. W. Ferris.

COY BURNETT,
Of Attorneys for Mountain Timber Co.

BEACH, SIMON & NELSON,
Attorneys for Appellant, U. S. Fidelity & Guaranty
Co.

A. E. CLARK,
Of Attorneys for Geo. V. Burke and E. W. Ferris,
Administrator of the Estate of David L. Kelly,
Decd.

COY BURNETT,
Attorney for Mountain Timber Co.

Approved:

EDWARD E. CUSHMAN,
Judge of the United States District Court for the
Western District of Washington, Southern Di-
vision.

(Filed Jan. 28th, 1916.) [21]

*In the District Court of the United States for the
District of Washington, Southern Division.*

No. 3—E.

GEORGE B. BURKE and E. W. FERRIS, as Ad-
ministrator of the Estate of DAVID L.
KELLY, Deceased,

Plaintiffs,

v.

MOUNTAIN TIMBER COMPANY, a Corporation,
Defendant.

Decree.

This cause being at issue, and being regularly upon the trial calendar of this Court, came on for hearing and determination on the 12th day of January, 1915, and was tried upon that day and succeeding days. The cause was tried before the Court without a jury (it being a cause in equity), Honorable E. E. Cushman, Judge presiding.

The plaintiffs appeared by their attorneys, M. J. Gordon and A. E. Clark. The defendant appeared by its attorneys E. C. Strode and Coy Burnett.

The Court being at this time fully advised in the premises, and said cause now coming on upon application for a decree, it is

CONSIDERED, ORDERED AND DECREED that the plaintiffs George B. Burke and E. W. Ferris, as administrator of the Estate of David L. Kelly, deceased, have and recover and from the defendant Mountain Timber Company and the United States Fidelity & Guaranty Company, of Baltimore, Maryland, the sum of \$32,500.00, and interest thereon at

the rate of 5% per annum from the 3d day of February, 1910; and the further sum of \$2,500.00 as attorney's fees, allowed to the plaintiffs in [22] this cause; and the further sum of \$312.40 taxed and allowed herein as costs and disbursements, making in all the sum of \$44,128.00; and it is further ordered that this judgment bear interest at 5% until paid or satisfied.

CONSIDERED, ORDERED and DECREED, that the mortgage described in the complaint, and in the supplemental complaint in this cause, be foreclosed, according to law, and the rules and practice of this Court; and that the following real estate described therein, be sold to satisfy the amount of the aforesaid judgment, to wit:

The East Half of the East Half of Section Nine (9); the West Half of the Northwest Quarter, the Southwest Quarter, and the West Half of the Southeast Quarter of Section Ten (10), the Southwest Quarter of Section Eleven (11), the North Half, the Southwest Quarter of Section Fourteen (14), all in Township Six (6), North, Range One (1) West of Willamette Meridian, excepting a certain reservation for a schoolhouse site in Section Nine (9), now appearing on the records, all situated in the county of Cowlitz, State of Washington.

That the proceeds of said sale, or so much thereof as may be necessary, shall be applied to the payment of the amount hereinbefore adjudged and decreed to be due to the plaintiffs; and that plaintiffs may have general execution against any of the property of the

said defendant Mountain Timber Company, and the said United States Fidelity & Guaranty Company, for any deficiency remaining after the application upon said judgment of the proceeds of said sale; and it is further

CONSIDERED, ORDERED and DECREED, that said premises shall be sold free and clear of any right, interest, estate, lien or claim of said defendant, or any person claiming by, through or under it, save and except the right of redemption as by law provided; and it is further,

CONSIDERED, ORDERED and DECREED, that plaintiffs may [23] become a purchaser of said property upon said foreclosure sale, and that the purchaser at said foreclosure sale shall be let into possession of said mortgage premises upon the confirmation of said sale.

Dated this 6th day of July, 1915.

EDWARD E. CUSHMAN,
Judge.

(Filed July 6, 1915.) [24]

**[Certificate of Clerk U. S. District Court to
Transcript of the Record, etc.]**

United States of America,
Western District of Washington,—ss.

I, Frank L. Crosby, Clerk of the United States District Court for the Western District of Washington, do hereby certify and return the foregoing and attached to be a true, full and correct transcript of the papers and proceedings in the case of George B.

Burke and E. W. Ferris, as Administrator of the Estate of DAVID F. KELLY, Deceased, vs. MOUNTAIN TIMBER COMPANY, a Corporation, lately pending in this court, pursuant to stipulation of counsel herein filed, being the appeal of the United States Fidelity & Guaranty Company, a corporation, herein, as the originals thereof appear on file in this Court, at Tacoma, in the District aforesaid

I further certify that I have attached hereto the original citation and original order extending time for transcript on appeal.

I further certify that the following is a full, true and correct statement of all expenses, costs, fees and charges incurred and paid into my office by and on behalf of the appellant herein, for making the record, certificate and return to the United States Circuit Court of Appeals for the Ninth Circuit, to wit:

Clerk's fees (sec. 828, R. S. U. S.) for	
making record, certificate and re-	
turn, 63 folios at 15¢ ea.....	9.45
Clerk's certificate to transcript, 2 folios	
and seal	50

[25]

ATTEST MY OFFICIAL SIGNATURE, AND THE SEAL OF THIS COURT, at Tacoma, in the District aforesaid, this 31st day of January, A. D. 1916.

[Seal]

FRANK L. CROSBY,
Clerk.

By E. C. Ellington,
Deputy Clerk. [26]

*In the United States District Court for the Western
District of Washington, Southern Division.*

GEO. B. BURKE, and E. W. FERRIS, as Ad-
ministrator of the Estate of DAVID L.
KELLY, Deceased,

Plaintiffs,

v.

MOUNTAIN TIMBER COMPANY, a Corporation,
Defendant.

Citation [on Appeal (Original)].

United States of America,—ss.

To Geo. B. Burke, E. N. Ferris, Administrator of the
Estate of David L. Kelly, Deceased, and to
Mountain Timber Company:

You are hereby cited and admonished to be and
appear before the United States Circuit Court of
Appeals, for the Ninth Circuit, at San Francisco,
California, on the 1st day of February, 1916, pur-
suant to the Appeal filed in the Clerk's Office of the
District Court of the United States for the Western
District of Washington, Southern Division, in the
above-entitled cause, wherein, the U. S. Fidelity
& Guaranty Company is appellant, and Geo. B.
Burke and E. W. Ferris, Administrator of the Estate
of David L. Kelly, and Mountain Timber Company,
are Respondents, to show cause, if any there be,
why the decree in the petition for and allowance of
appeal mentioned should not be corrected and speedy
justice should not be done to the parties on that be-
half. [27]

WITNESS the Honorable W. B. GILBERT,
Judge of the United States Circuit Court of Appeals,
for the Ninth Circuit, this 3d day of January, 1916.

WM. B. GILBERT,

Circuit Judge. [28]

I hereby, this 3d day of January, 1916, accept due
personal service of this Citation on behalf of Moun-
tain Timber Company.

COY BURNETT,

Of Solicitors for Mountain Timber Co.

I hereby, this 3d day of January, 1916, accept due
personal service of this Citation on behalf of Geo. B.
Burke.

A. E. CLARK,

Of Solicitors for Geo. B. Burke.

I hereby, this 4th day of January, 1916, accept due
personal service of this Citation on behalf of E. W.
Ferris, as Admr. of the Estate of David L. Kelly,
dec'd.

M. J. GORDON,

Of Solicitors for E. W. Ferris, Admr. of David L.
Kelly, Decd. [29]

[Endorsed]: In the U. S. District Court for the
Western District of Washington, Southern Division.
Geo. B. Burke, and E. N. Ferris, as Admr. of the
Estate of David L. Kelly, Deceased, Plaintiffs v.
Mountain Timber Co., a Corporation, Defendant.
Citation. Filed in the U. S. District Court, Western
Dist. of Washington, Southern Division. Jan. 4,
1916. Frank L. Crosby, Clerk. By F. M. Harsh-
berger, Deputy.

*In the United States Circuit Court of Appeals, for
the Ninth Judicial Circuit.*

No. —.

UNITED STATES FIDELITY & GUARANTY
COMPANY, a Corporation,

Appellant.

vs.

GEORGE B. BURKE and E. W. Ferris, as Admin-
istrator of the Estate of DAVID L. KELLY,
Deceased, and MOUNTAIN TIMBER COM-
PANY, a Corporation,

Appellees.

Order Extending Time for Transcript on Appeal.

For good cause shown it is now ORDERED that the time within which the record on appeal in the above-entitled case may be filed in this court at San Francisco, California, be and the same is hereby extended to and including the 25th day of February, A. D. 1916.

Dated this 28th day of January, A. D. 1916.

EDWARD E. CUSHMAN,
District Judge for the Western District of Washing-
ton.

[Endorsed]: Filed in the U. S. District Court,
Western Dist. of Washington, Southern Division.
Jan. 28, 1916. Frank L. Crosby, Clerk. By F. M.
Harshberger, Deputy.

[Endorsed]: No. 2744. United States Circuit Court of Appeals for the Ninth Circuit. United States Fidelity & Guaranty Company, a Corporation, Appellant, vs. George B. Burke and E. W. Ferris, as Administrator of the Estate of David L. Kelly, Deceased, and Mountain Timber Company, a Corporation, Appellees. Transcript of Record. Upon Appeal from the United States District Court for the Western District of Washington, Southern Division.

Filed February 4, 1916.

F. D. MONCKTON,

Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

By Meredith Sawyer,
Deputy Clerk.

